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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

SARKIS GUMRIKYAN et al.,

Plaintiffs and Appellants,

v.

KHACHIK KESHESHYAN et al.,

Defendants and Respondents.

B191462

(Los Angeles County
Super. Ct. No. EC036378)

APPEAL from an order of the Superior Court of Los Angeles County, Charles W. Stoll, Judge. Dismissed.

No appearance for Plaintiffs and Appellants.

Michael P. Rubin & Associates and Michael P. Rubin for Defendants and Respondents.

PRELIMINARY STATEMENT

Sarkis Gumrikyan, etc. (plaintiffs) are attempting to appeal an order entered by the trial court approving sale by the court appointed receiver of the receivership real property.

The subject of the appeal is substantially identical to a prior appeal in which plaintiffs attempted to appeal an order giving the receiver authority to sell the receivership business and real property. We granted the motion to dismiss the prior appeal and dismissed the petition for writ of supersedeas as moot. We denied the motion for sanctions, but awarded costs to defendants.

In connection with the current appeal, plaintiffs filed a second petition for writ of supersedeas. As in the prior matter, defendants Khachik Kesheshyan and Hamlet Derhovanessian (defendants) filed a motion to dismiss the appeal and requested sanctions and attorney fees.

DISCUSSION

1. Factual and Procedural Background.

Plaintiffs filed this action seeking dissolution of the partnership, an accounting, rescission of contract, and tortious interference with prospective business advantage. The complaint alleged that defendants induced plaintiffs to enter into a business relationship to develop a banquet hall to be known as “Caesar’s” but failed to complete the terms of the contract.

Defendants filed a cross-complaint alleging breach of contract, fraud, breach of fiduciary duty, declaratory relief, quiet title, constructive trust, accounting and various common counts.

On July 16, 2004, following trial, the court held all partners shared title to the business and its assets. The court further ordered, as requested by all parties, dissolution of the partnership, quiet title as to the partnership real property, and directed that “the assets, profits and losses be distributed equally among the seven partners pursuant to an accounting by an independent certified accountant.” No appeal or writ petition was filed

following the July 2004 decision that determined the rights of the partners in the business, its real property and other business assets.

On June 27, 2005, the court appointed David Pasternak as receiver with directions to take total control, operate the existing business, prepare an accounting and make recommendations with respect to assets. The court also gave the receiver authority to sell assets.

An order appointing a receiver is appealable. (Code Civ. Proc., § 904.1, subd. (a)(7).) Plaintiffs did not file an appeal and, by conduct, recognized the appointment. They, therefore, are estopped from denying the validity of the appointment. (*Hise v. Superior Court* (1943) 21 Cal.2d 614, 622-623.)

On January 17, 2006, the court held a status conference. Counsel for the parties, the receiver, a court-appointed accountant, and a proposed realtor were present for the status conference. Each side had hired an independent certified public accountant to evaluate the value of the business.

The receiver informed the court that both plaintiffs and defendants had indicated willingness to purchase the property. The receiver, however, stated purchase of the property must be open, not only to the parties, but also to the public. Such an open sale was necessary in order for the receiver to perform his duty to maximize the benefit to each partner. The receiver described a competitive bidding procedure to determine the best price with all offers, counter-offers, and negotiations provided to the parties. The court approved the receiver's request and ordered sale of the business, real property, furnishings, personal property, and all related assets.

On March 3rd, the court granted the receiver's application for an order listing the business for sale. This is the order that was the subject of the prior petition for writ of supersedeas and motion to dismiss the appeal. (*Gumrikyan et al. v. Kesheshyan et al.* (June 27, 2006, B189588) [nonpub. opn.] review den. Aug. 16, 2006.)

The receiver immediately signed a contract listing the property for sale and on June 2, 2006, the court approved the sale of the business and its real property.

Plaintiffs then filed the second notice of appeal, seeking review of the order approving the sale of the real property and other business assets. Plaintiffs also filed a companion petition for writ of supersedeas seeking to prevent the sale to any person or entity other than plaintiffs themselves.

Defendants' responded with the motion to dismiss the instant appeal as another appeal from an interlocutory order.

2. Motion to Dismiss Appeal.

The right to appeal is wholly statutory and is limited to those judgments and orders enumerated in Code of Civil Procedure section 904.1. (*Steen v. Fremont Cemetery Corp.* (1992) 9 Cal.App.4th 1221, 1226.) An order directing dissolution of a partnership is not listed in the statute. A receiver's decision to sell partnership property is not listed in the statute. The trial court's order approving sale of partnership property is not listed in the statute.

Subsequent to the appointment of the receiver, the receiver holds the assets for the benefit of the court and not for the plaintiff or the defendant. (Cal. Rules of Court, rule 1903.) The receiver has a duty to act for the benefit of all who have an interest in the property. (Cal. Rules of Court, rule 1903(a)(2).) The order approving sale of the partnership property is not distinct and severable from the subject of the litigation, but a necessary step in dissolution of the partnership. Thus, it is not appealable as a collateral matter. An appeal can be made only from "a judgment which 'terminates the proceeding in the lower court by completely disposing of the matter in controversy.' " (*Kinoshita v. Horio* (1986) 186 Cal.App.3d 959, 963.)

Early cases established that an order dissolving a partnership, ordering an accounting and sale of partnership property is not appealable. (*Gianelli v. Briscoe* (1919) 40 Cal.App. 532, 535.) An order dissolving a partnership and directing sale of the property is interlocutory in nature because "it leaves for future determination and

adjudication the question as to the proceeds and profits accruing and derived from the business of the partnership” (*Ibid.*)

Plaintiffs cite to *Degnan v. Morrow* (1969) 2 Cal.App.3d 358, a case involving partition of real property. Plaintiffs did not plead a partition, there is no request for partition from any party, and the court did not consider or award partition of the property. *Degnan* is not applicable.

Plaintiffs also cite *Stockton v. Rattner* (1972) 22 Cal.App.3d 965, in which the court authorized sale of real property under the conditions of an assignment made for the benefit of creditors. *Stockton* does not directly involve partnership law or a receivership. It was an action by creditors that resulted in sale of the partnership assets to satisfy debts owed by the partnership to third parties.

In *Kinoshita v. Horio*, *supra*, 186 Cal.App.3d 959, the court dismissed an appeal from a judgment directing the dissolution of the partnership and sale of its assets, rejecting the earlier decisions that indicated an appeal, under limited circumstances, might be possible, noting such cases had “been not only ‘modified’ but impliedly overruled by the contrary authorities . . . [citations].” (*Id.* at p. 965.)

The *Kinoshita* court held a judgment directing dissolution of a partnership and sale of its assets by a receiver is interlocutory and, for that reason, was not appealable. *Kinoshita* described the difficulty in partnership dissolutions because they require a series of adjudications by the trial court. “Typically, the court must first determine the weighty threshold questions on which the parties’ rights and obligations depend, such as whether a partnership was formed and what assets were acquired. The court may then be called upon to order one or more provisional or special remedies which necessarily occur in a progression of steps culminating in a final decree which settles the actions taken under the earlier rulings. [Citations.] [¶] Because of this serial aspect actions involving provisional remedies, and especially partnership dissolutions, have been the source of much judicial perplexity.[Fn omitted]” (*Kinoshita v. Horio*, *supra*, 186 Cal.App.3d at p. 963.)

The *Kinoshita* court concluded “No legitimate interest is furthered by making a judgment like this one appealable. Those whose rights and obligations depend on the judgment are best served by a single complete and final resolution of the issues presented. A right to an interlocutory appeal permits a party who benefits from delay to frustrate the goals of promptness and certainty of adjudication. . . . Thus, every exception to the final judgment rule not only forges another weapon for the obstructive litigant but also requires a genuinely aggrieved party to choose between immediate appeal and the permanent loss of possibly meritorious objections. . . . [¶] For all these reasons, exceptions to the one final judgment rule should not be allowed unless clearly mandated. Yet despite the hopeful words of the cases fifty years ago, the confusion over judgments like this one has never been entirely eliminated. A definite rule is necessary to reduce both the temptation to file dilatory appeals and the compulsion to file protective ones. We therefore hold that a judgment decreeing the dissolution of a partnership and directing the sale of assets by a receiver is not a final judgment and that in the absence of a statutory exception it is not appealable.” [Fn omitted]” (*Kinoshita v. Horio, supra*, 186 Cal.App.3d at pp. 967-968.)

In *UAP-Columbus JV 326132 v. Nesbitt* (1991) 234 Cal.App.3d 1028, this court denied a motion to dismiss an appeal, distinguishing *Kinoshita*: “*Kinoshita* was an appeal from a judgment in a proceeding for dissolution of a partnership. The reviewing court held that the judgment appealed from was interlocutory, and that the appeal must be dismissed because it was from a nonappealable order. The challenged judgment in *Kinoshita* ordered the receiver, subject to the court’s approval, to sell the partnership property, pay its debts, distribute the remaining assets, and dissolve the partnership. . . . The judgment also provided that the trial court retained jurisdiction for all purposes to insure compliance with the judgment and dissolution and the distribution of the partnership assets. [Citation.] Clearly, in *Kinoshita*, further judicial action was essential to the final determination of the rights of the parties to the action.” (*UAP-Columbus JV 326132 v. Nesbitt, supra*, 234 Cal.App.3d at p. 1035.) The trial court’s decision in *UAP-Columbus* did not contemplate further judicial action to the final determination of

the rights of the parties. All that remained was tabulation of the costs and fees to be determined by cost bill procedure after entry of judgment. (*Id.* at p. 1036.) Here, the trial court's order "leaves for future determination and adjudication the question as to the proceeds and profits accruing and derived from the business of the partnership" (*Gianelli v. Briscoe, supra*, 40 Cal.App. at p. 535.)

The trial court has not determined the distribution of proceeds, how to allocate the profits and expenses among the partners and the final accounting has not been completed.

In *Raff v. Raff* (1964) 61 Cal.2d 514, a case in essentially the same procedural posture, the court held an order approving the account of the receiver showed the receiver was to continue to hold the assets and act as a receiver under the orders of the court, and thus was not appealable. Here, the receiver continues to hold the assets pending further court action.

The test for appealability is "where no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree, that decree is final, but where anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the decree is interlocutory." (*Kinoshita v. Horio, supra*, 186 Cal.App.3d at p. 963.)

The order plaintiffs are attempting to appeal does not set out a complete formula for distribution of the partnership assets, and does not terminate the proceeding by completely disposing of the matter in controversy. The court and the parties are awaiting a final accounting. The receiver then must pay the debts of the receivership property, determine the means of allocation of such debts, distribute any remaining assets, and allocate costs and expenses. Judicial supervision still is required. The order disposing of the receivership property is interlocutory in nature, and therefore is not appealable. Moreover, the court *should* confirm a receiver's sale unless there is a grossly inadequate sales price or misconduct. (*People v. Stark* (2005) 131 Cal.App.4th 184, 205-207.) There is no indication of a grossly inadequate sales price. Plaintiffs do not attempt to allege misconduct in determination of the price paid for the partnership real property.

In fact, plaintiffs offered to purchase the property for \$3 million. The actual sale price is \$6.3 million.

Whether an order or judgment is appealable is jurisdictional. (*Kinoshita v. Horio*, *supra*, 186 Cal.App.3d at p. 962.) In this case, the order plaintiffs are attempting to appeal is interlocutory in nature. Accordingly, the appeal is dismissed.

3. *Request for sanctions.*

Defendants argue the second attempt to appeal an interlocutory order is frivolous and taken solely in an attempt to delay implementation of the trial court's orders. An appeal is frivolous "when it is prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment—or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit." (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) Defendants therefore seek sanctions as well as attorney fees and costs.

The circumstances are not so egregious that sanctions must be imposed, especially in view of the fact plaintiffs did not file an opposition to the motion to dismiss the appeal. We therefore deny defendants' request for sanctions.

DISPOSITION

The motion to dismiss the appeal is granted. The petition for writ of supersedeas is dismissed as moot. The request for sanctions is denied.

Costs of appeal and motion to dismiss are awarded to defendants.

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KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.